Bail Slip

The Appellant/Accused namely Punniakoti was directed to be released on bail as per order of this court dated 9.4.2003 and made in Crl.MP.No.3137/2003 in Crl.A.No.290/03 on the file of this Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 9.8.2007

CORAM:

THE HON'BLE MR. JUSTICE R. REGUPATHI

CRL.A.No.290 of 2003

Punniakoti ..Appellant/Accused

vs.

State rep. by
Inspector of Police,
Maraimalai Nagar Police Station,
Kancheepuram District.Respondent/Complainant
Cr.No.167/1997

Appeal filed under Section 374 Cr.P.C. against the conviction and sentence passed by the Additional Assistant Sessions Judge, Chingleput in his judgment made in S.C.No.132 of 1998 dated 28.1.2003.

For Appellant : Mr. S. Shanmuga Velayutham
Senior Counsel
for Mr. N. Shankar
For Respondent : Mr. Hasan Mohamed Jinnah
Govt. Advocate (Crl. Side)

J U D G M E N T

The appellant/sole accused in the case was tried in S.C.No.132 of 1998 on the file of the Additional Assistant Sessions Judge, Chengleput for the offences under Sections 366 and 376(i) I.P.C. and was convicted and sentenced to undergo rigorous imprisonment for 7 years and 10 years respectively and a fine of Rs.500/-, in default to undergo simple imprisonment for two months, for each offence, by judgment dated 28.1.2003. Both the sentences were ordered to run concurrently. Aggrieved against the conviction and sentence, the present appeal has been preferred by the accused.

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2. The charges levelled against the accused are that on 25.2.1997 at about 10.00 a.m. he has induced one Vimala Mary-the victim girl aged about 12 years, who is a mentally retarded and taken her to his residence, saying that the dog of the victim girl is with him, and thereafter, he bolted the doors from inside and committed rape upon her.

3. The prosecution examined P.Ws.1 to 13 and marked Exhibits P.1 to P.18 & M.Os.1 to 5 to substantiate its case. When the accused was questioned under Section 313 Cr.P.C., he has denied the offence and on his side neither oral nor documentary materials were marked.

4. The learned trial Judge, assessing the oral and documentary evidence and on perusal of the materials produced before the Court, came to the conclusion that the charges framed against the accused are proved and convicted and sentenced him as aforementioned.

5. The case of the prosecution in brief:

(a) P.Ws.1 & 2 are the father and mother of the victim girl, P.W.3. On 25.2.1997 at about 9.00 p.m., P.W.2 sent P.W.3 to bring milk from a nearby shop and since she did not return back even after 10 minutes, P.W.2 went in search of her and after gathering information from the neighbours that the girl has been taken by the accused, she reached the residence of the accused, where she found the door locked from inside and when she knocked the door, there was no response and heard only the T.V. noise. Therefore, she sought the assistance of neighbours viz., P.Ws.4, 6 to 8 to open the door and at the time when the accused opened the door, she found P.W.3 naked and slovenly on the floor and thereafter she was taken to their residence.

(b) After the arrival of P.W.1, P.W.2 narrated the incident and with the help of P.W.5, who is a neighbour, P.W.1 lodged a complaint-Ex.P.1 to P.W.12, the Sub Inspector of Police, on the same day at about 8.00 p.m., who registered a case in Cr.No.166/1997 for the offence punishable under Section 376 I.P.C. and the printed F.I.R. is Ex.P.11.

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(c) P.W.13, the Inspector of Police took over the investigation of the case, reached the scene of crime at 9.00 p.m., and in the presence of witnesses, prepared observation mahazar-Ex.P.12, rough sketch-Ex.P.13 and recovered petti coat-M.O.1, jacket-M.O.2 of P.W.3 & M.O.3- half sleeve shirt under the cover of recovery mahazar Ex.P.14 at 10.00 p.m. and examined P.Ws.1 to 8 and recorded their statements. He has also arrested the accused on the same day and recovered his Lungi and an underwear-M.Os.4 & 5

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respectively under Mahazar-Ex.P.15 and remanded him to judicial custody on 26.2.1997.

(d) On requisition-Ex.P.16, the learned Magistrate ordered to send both the garments of the victim girl and the accused for examination and the Chemical Examination Report is Ex.P.10. The victim girl has also been subjected to psychiatric test by the Professor of Psychiatry, Chengalpattu Medical College and Hospital, Chengalpattu and Ex.P.6 is the psychiatric test report. P.W.13 also sent the victim and the accused for medical examination and they were examined by P.Ws.9 & 10 respectively. P.W.9 on examination of P.W.3 issued a certificate-Ex.P.2, wherein it has been stated as follows:

"Patient IQ less. No external injury or abrasions.
PA: Ut not palpulu, No other mass or tenderness.
PV: Vagina admits two fingers easily painless.
CX Ut A.U.N.S. FX free. No discharge PV
S/E : CX normal. May not have been raped."

P.W.10 on examination of the accused issued a certificate for potency-Ex.P.4 and Age Certificate-Ex.P5. In Ex.P.4, the doctor has opined that "there is nothing to suggest that the individual is impotent". Both P.Ws.9 and 10 have also given evidence to the effect that they have examined the victim and the accused respectively.

6. The learned Senior Counsel for the appellant submits that admittedly P.W.3 is a mentally retarded girl. Insofar as the commission of the offence of rape is concerned, only the evidence of P.W.3 is available and on perusal of the same, the offence of rape could not be substantiated. It has been stated by her that the accused has locked the door after taking her to his residence and fallen on her. When the victim girl shouted, the accused threatened her and fallen on her. It was further stated by P.W.3 that she could not threw the accused away and at that time her mother came and beat the accused. Thereafter, she was taken to her residence. A perusal of the evidence of P.W.2 would only show that the appellant was found in the company of the victim girl within his residence. The evidence of P.W.1, the father and P.W.5 the neighbour would only show that a report has been given in this regard. P.Ws.4, 6 to 8-neighbours, who are alleged to have reached the residence at the time when the appellant opened the door, did not support the case of the prosecution and therefore, they have been treated as hostile. Now the only corroborative evidence available for the prosecution to improve their case is the evidence of P.W.9, the doctor, who examined the victim girl. But even she has stated in Ex.P.2- the accident register that the victim girl may not have been raped. She has also did not notice any external injuries on the private parts as well as on the body of the victim. Therefore, it is unsafe to convict the accused for the offence of

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rape on the evidence of the victim girl unless it is corroborated by some independent evidence confirming in material particulars. Under such circumstances, the fact remains that the offence of rape has not been substantiated. However, relying on the evidence of the victim girl and P.W.2, if at all the accused could be dealt with under Sections 366 and 354 I.P.C. and not under Section 376(i) I.P.C.

7. Per Contra, the learned Government Advocate submits that in a case of rape the solitary evidence of the victim girl alone is sufficient and requires no corroboration. He further submits that in Ex.P.1, it has been specifically stated that P.W.2 found the victim inside the residence of the accused slovenly at the time when the accused opened the door. Even in the evidence given by P.W.3, she has stated that the accused took her to his residence and committed rape. Though the medical evidence does not corroborate to this effect, the fact remains that the occurrence had taken place in the manner put forth by the prosecution and under such circumstances both the offences under Sections 366 and 376(i) I.P.C. are made out.

8. I have perused the materials available on record and heard the submissions of the learned counsel for the appellant and the learned Government Advocate.

9. It is an unfortunate case where a mentally retarded minor girl has been taken by the accused, who is a married man and father of two children with bad intention. Knowing fully well that the victim is a mentally retarded, the accused has kidnapped her to his residence. On a perusal of the evidence of P.Ws.2 & 3, it appears that the accused has committed an act of outraging the modesty of the child. On a careful scrutiny of their evidence, the fact remains that the victim girl has been taken to the residence of the accused and though the offence of commission of rape has not been made out, the modesty of the girl has been outraged by the accused. In a case of rape, apart from the evidence of the victim, the medical evidence also occupies a prime position. P.W.9 who is a Medical Officer on examining P.W.3 on 27.2.1997, i.e. two days after the occurrence, has given positive opinion that there was no external injuries on the body of the victim girl and further she has opined that the victim has not been subjected to rape. Though the evidence of P.W.3 can be taken as a sole material for convicting the accused, the opinion given by the Professor of Psychiatry in his report Ex.P.6 cannot be easily brushed aside, where it has been stated as follows:

> "Vimala Mary D/o. Antony aged 12 years was assessed in the Psychiatric out-patient Department of Chengalpattu Medical College Hospital from 28.2.1997 to 11.3.1997.

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Information obtained from the parent of Vimala Mary Her birth and developmental milestones were normal till the age of 6 years. She was doing first Standard when she developed Tuberculous. Meningitis and became dull and could not continue her studies. She also developed weakness of the Right Side and became hyperactive. She also developed involuntary movements of the limbs on the Right Side.

Examination of Vimala Mary

She is fairly clean ambulant, alert and hyperactive. She is co-operative for the interview. Her talk is relevant and coherent to simple questions. She is oriented to place and persons. Her attention can be aroused and sustained with difficulty. Her memory for recent and remote events is fair. Her abstract thinking is impaired. Her fund of information and intelligence is below average. She has diminished impulse control. Her judgment and insight are impaired.

On psychological testing, her intelligence quotient is 44.

Based on the above, I am of the opinion that Vimala Mary has moderate mental retardation with right sided hemiparesis with hyperkinetic behaviour as a result of Tuberculous Meningitis and she is able to narrate the alleged rape incident."

10. The occurrence has taken place on 25.2.1997 and the victim girl was examined in Court on 13.12.2000. Admittedly, P.W.3 is mentally retarded girl. The evidence given by the girl of such a mental caliber, before the Court, nearly 3 ½ years after the occurrence has to be carefully scrutinised and conviction cannot be based solely upon such evidence. But on a reading of the evidence of P.W.9 as well as the opinion of the Psychiatrist, I am of the considered opinion that the offence of rape has not been made out. However the victim was found within the residence of the accused slovenly and was found nued. Though the personal apparels of the victim and the accused were sent for chemical analysis, an opinion has been received in Ex.P.10 to the effect that neither blood nor semen was detected on the material objects viz., M.Os.1, 2, 4 & 5. Therefore, I am of the considered opinion that the offence under Section 376(i) I.P.C. has not been made out and the accused is acquitted of the said charge, setting aside the conviction and sentence.

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11. The accused knowing fully well that P.W.3 is a mentally retarded girl induced her dishonestly and taken her to his residence. Therefore, I am of the considered opinion that the offence under Section 366 I.P.C. is made out. Though the appellant is acquitted for the offence punishable under Section 376(i) I.P.C., since the accused removed the dress of the victim and made her nued, further committed certain acts which would amount to outraging her modesty, I am of the considered view that the above act would attract the offence punishable under Section 354 I.P.C. and therefore, he is guilty of the said offence.

12. While coming to the question of sentence, insofar as Section 366 I.P.C. is concerned, the learned Senior Advocate for the appellant submits that the appellant was in judicial custody during investigation and pending appeal for 116 days and therefore, the sentence could be reduced to the extent of the period which he has already undergone. In view of the facts and circumstances of the case, on instructions, the learned Senior Counsel also submitted that the appellant is willing to pay Rs.50,000/- by way of compensation to the victim and to ascertain whether the victim family is willing to accept the compensation, the case has been adjourned today and both the appellant as well as P.W.2-the mother of the victim girl were present in the Court, who expressed their willingness for payment of compensation and Rs.50,000/- has been handed over to the mother of the victim girl. Under the above circumstances, the sentence of 7 years R.I. imposed for the offence under Sections 366 I.P.C. is concerned, it is modified to the period already undergone and insofar as the offence under Section 354 I.P.C. is concerned, no separate sentence is awarded, in view of the compensation made.

For the foregoing reasons, the accused is acquitted of the charge under Section 376(i) I.P.C. and the appeal is allowed in part with the above modification in conviction and sentence.

kv

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To

1. The Addl. Asst. Sessions Judge,
   Chengalput.

2. Do Thro' The Prl Sessions Judge, Chegalput.

3. The Additional District Sessions Judge,
   Fast Track Court,
   Kancheepuram.

4. The Superintendent, Central Prison, Cuddalore.

5. The Public Prosecutor, High Court, Madras.

6. The Inspector of Police, Maraimalai Nagar Police Station,
   Kancheepuram District.

+ 1 cc to Mr. Shankar, Government Advocate SR No. 49838

MDR(CO)
SR/23.8.2007

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